82-1337

Office-Supreme Court, U.S.
FILED
FEB 4 1983
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1982

ROBIN J. PECORA,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED

1. The petitioner's conviction upon a charge of driving while impaired should be reversed because of the violations of the Fourth Amendment that occurred in connection with the warrantless and constitutionally deficient interrogation of the petitioner.

2. The action in refusing to merge the conviction of the charge of negligent driving into the conviction of the more serious crime of driving while impaired was constitutionally deficient.

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Special Appeals of Maryland rendered in the instant case, said decision having been affirmed by the Court of Appeals of Maryland by the denial of the petition for writ of certiorari filed with that court.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland is set forth in its full text in the appendix attached hereto.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Rule 17 of the rules of this Court governing review on a petition for writ of certiorari. The review sought by this Court is that of the decision of the Court of Special Appeals of Maryland as affirmed by the Court of Appeals of Maryland. The final action of the Court of Appeals of Maryland in denying a writ of certiorari to the Court of Special Appeals of Maryland was entered by order dated November 5, 1982, which order became final with respect to further review by the Court of Appeals of Maryland 30 days thereafter, on December 6, 1982. Review by this Court of the questions presented herein is desirable and in the public interest because the decision of the Court of Special Appeals of Maryland, as affirmed by the Court of Appeals of Maryland is in conflict with the previous decisions of this Court regarding the constitutional dimensions of a traffic arrest and search. The jurisdiction of this Court to entertain this petition exists by virtue of Article 3, Section 2, Clause 2 of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Annotated Code of Maryland - Transportation Article, Section 13-409; Section 16-112; Section 21-901.1; Section 21-902; Section 21-904.

United States Constitution, Fourth, Fifth and Fourteenth Amendments.

The verbatim text of the foregoing statutes and constitutional provisions are set forth at length in the appendix attached.

STATEMENT OF THE CASE

As a result of the incidents which took place in the early morning hours of January 28, 1981, the petitioner was charged with various violations of the Transportation Article of the Annotated Code of Maryland in five separate traffic citations. The petitioner prayed a trial by jury in the District Court of Maryland for Baltimore City, which required the various charges to be removed for trial to the Criminal Court of Baltimore City on May 27, 1981. After numerous pre-trial motions were filed, and after much pre-trial litigation over discovery and related matters, the case was called for trial on October 2, 1981, before the Honorable Robert M. Bell, presiding without a jury. At the conclusion of the State's case in chief, on October 5, 1981, the petitioner moved for a judgment of acquittal as to each and every one of the pending charges. At that time, the petitioner, through counsel, argued the constitutional questions which are presented for review by this Court. These same constitutional questions were raised again at the conclusion of all the evidence and were denied on both occasions by the trial court when it rendered the guilty verdicts against the petitioner. These same questions were raised on appeal to the Court of Special Appeals of Maryland and by petition to the Court of Appeals of Maryland.

At the time the issues were raised before the trial court the following facts had been presented. On the evening of January 27, 1981, the petitioner, a member of the Bar of the State of Maryland and of the State of Florida, flew to his Baltimore office to meet with a client who had been referred to him by an associate, Peter Lewis. The meeting took place in Mr. Lewis' office and involved a criminal problem in the State of Florida. The petitioner arrived at Mr. Lewis' office sometime after 8:00 P.M. on that evening and conferred with the new client for approximately one and one-half hours. During that period of time, the petitioner consumed only a single glass of wine, although he was offered

other alcoholic beverages. In the opinion of Mr. Lewis, at the time he left his company, the petitioner was "absolutely sober".

Upon leaving Mr. Lewis' company, the petitioner, with a client by the name of Mr. Cornell, went to dinner at Velleggia's Restaurant in the Little Italy section of the City of Baltimore. Arriving at the restaurant between 9:30 P.M. and 10:00 P.M., the petitioner came into contact with the maitre d', Rick Velleggia, who testified that he prepared a special veal dish for the petitioner and his client. Mr. Velleggia further testified that neither the petitioner nor his client had anything to drink that was alcoholic during dinner and, at the time he last observed the petitioner, at approximately midnight, the petitioner was sober.

Stanley L. Crowetz, the manager of Leon's Tyson Place, testified that he observed the petitioner at approximately 12:45 A.M. on the date in question. Mr. Crowetz recalled serving the petitioner and his client a round of drinks from the bar in his establishment. Mr. Crowetz did not observe the petitioner purchase or consume any alcoholic beverages, other than the first drink until the establishment closed at 2:00 A.M. Mr. Crowetz further testified that, at the time the petitioner left his establishment at closing time, he did not appear intoxicated.

Agent Michael Sabo came into contact with the petitioner and his client immediately outside of Leon's Tyson Place at approximately 2:20 A.M. on the date in question. At that time, although he detected only a moderate odor of alcohol about the petitioner, he nonetheless reported that the effects of the alcohol on the petitioner were "obvious". Agent Sabo further testified that he observed a partial lack of coordination on the part of the petitioner, specifically a swaying in his walk, a condition that he did not initially observe in his first encounter with the petitioner at the bar. After being in the petitioner's company for only a few minutes at the bar, Agent Sabo returned to his police vehicle

and, a few minutes later, observed the petitioner's vehicle, being driven by the petitioner, heading in the direction of Biddle Street. Agent Sabo then began to follow the petitioner's vehicle down Biddle Street, which was one-way eastbound at that location.

Upon encountering the petitioner a second time, Agent Sabo noticed nothing different from his initial observation. After securing the necessary identification from the petitioner, including his driver's license and the registration to the vehicle, the officer requested the petitioner to exit the vehicle for the purpose of some "routine field tests". Agent Sabo testified that while he was conducting the "field tests", he did not have his citation book in his hand and, prior to that time, he had not yet advised the petitioner of any of his rights relative to a blood alcohol test. After speaking with the petitioner for several minutes, and after requiring him to perform these "field tests", the officer still had not determined to place him under arrest. The petitioner, believing that Agent Sabo no longer had any further tests to perform, returned to his vehicle. Although Agent Sabo was in a position to detain the petitioner, he did not do so, allowing the petitioner to re-enter his vehicle and to start his motor. At that time, the accelerator mechanism on the motor vehicle malfunctioned, causing the vehicle to accelerate suddenly, coming into contact with the vehicle in front of it, and after a momentary stop, surging forward again and striking the vehicle in front of it a second time. It was only at this point that Agent Sabo determined to place the petitioner under arrest and charge him with the offenses that were the subject of the proceedings before the trial court. Agent Sabo further testified that the petitioner was not under arrest until after his car had struck the car immediately ahead of it. The petitioner was immediately arrested and subsequently the arresting officer prepared the citations which were the subject of the proceedings before the trial court.

REASONS FOR GRANTING THE WRIT

The review of the decision of the Court of Appeals of Maryland in the instant case is desirable and in the public interest because of the importance of the legal principles with which the case at bar is concerned. At issue in the instant case are the actions of the arresting officer on the date in question, particularly those actions involved in the stopping of the petitioner's vehicle and the subsequent illegal investigatory procedures observed thereafter by the arresting officer. It is these procedures that are presented to this Court as being of "routine field tests", which form the background for the detention and arrest of the petitioner. These "routine field tests", and the actions which followed, were undertaken during the course of an investigatory stop that was in and of itself improper end illegal. Despite these deficiencies in the pre-arrest and investigatory procedures, the Court of Special Appeals of Maryland, in affirming the trial court, nonetheless concluded that its only responsibility was to observe the requirements of Maryland Rule 1086. In doing so, the Court of Special Appeals of Maryland ignored its responsibility to undertake an independent review of the constitutional questions raised by the within appeal. Because the questions presented in this appeal are common to the great majority of the investigatory stops and to the procedures observed during investigations of many serious traffic offenses, review by this Court of the decision of the Court of Special Appeals of Maryland is desirable and in the public interest. Further, this Court's interpretation and review of the principles of law governing such investigatory stops will provide guidance to trial judges and to the public with respect to their obligations and responsibilities regarding investigative procedures such as are the subject of these proceedings. Further, the related questions of the merger of the conviction of driving while impaired are also matters of important public interest, which are presented on a frequent basis to the trial judges for a proper determination. As such, all of these matters are matters of important public

interest and are the proper subject for review by this Court at this time.

The constitutional focus of the instant case is upon the actions of the arresting officer in stopping the petitioner's vehicle, in requiring him to exit the vehicle and perform "routine field tests" and in the officer's decision to undertake these actions when, in the officer's own mind, he did not have probable cause nor reasonable suspicion to charge the petitioner with a traffic violation. It is this fact that distinguishes the case at bar from the other cases that have been decided on this point with respect to the question of the existence of reasonable suspicion required to make an investigatory stop. Both the trial court and the Court of Special Appeals of Maryland ignored the actual state of mind of the arresting officer involved, and disregarded his testimony that, at the time he stopped the petitioner's vehicle and undertook his investigation, he was not yet satisfied that he had reasonable suspicion to charge the petitioner with a traffic violation. In fact, the arresting officer, Agent Sabo, did not even have his citation book with him at the time of the investigatory stop, nor at the time he requested the petitioner's license and the registration from the vehicle. Otherwise stated, the error committed by the trial court and the Court of Special Appeals of Maryland was in failing to consider what the arresting officer's actual state of mind was at the time of the illegal stop. Instead, what was considered was whether or not there was sufficient evidence to create a reasonable suspicion in their own minds. Such an approach substitutes the court's judgment for that of the arresting officer and invites impermissible after-the-fact evaluation of the reasonable suspicion for the stop based upon what the stop discloses. It is precisely the procedure of evaluating the sufficiency of the reasonable suspicion based upon what is disclosed by the stop that forms the constitutional issue presented by the case at bar.

There was clear evidence presented at trial with respect to the officer's state of mind at the time of the stopping of the petitioner's vehicle. As has been noted, Agent Sabo did not have his citation book with him at the time he first approached the petitioner's vehicle, and he candidly admitted that at the time he asked the petitioner to exit the vehicle, he was not yet satisfied in his own mind that he had probable cause to charge the petitioner with any traffic violation. Clearly, if Agent Sabo had believed that probable cause existed, he would have arrested the petitioner immediately and would not have bothered to administer the "routine field tests" that he undertook with the petitioner. Prior to stopping the vehicle, the arresting officer had observed only that the petitioner crossed the center line of the street (a one-way street) on three different occasions; however, he did not stop the vehicle to issue a citation for these violations or for any other reason until the petitioner had traveled several blocks further. Agent Sabo further testified that he observed no other unsafe driving maneuvers by the petitioner prior to the investigatory stop. Accordingly, it is respectfully submitted that this testimony, which was the only testimony regarding the petitioner's operation of the motor vehicle, was insufficient to constitute reasonable suspicion that a moving violation had occurred. The arresting officer conceded as much in his trial testimony. Accordingly, at the time of the stop, the arresting officer did not possess reasonable suspicion that a moving violation had occurred and thus the investigatory stop was constitutionally invalid. *See Delaware v. Prouse*, 440 U.S. 684 (1980). Once the petitioner complied with the requirements of §16-112 and §13-409 of the Transportation Article of the Annotated Code of Maryland with respect to presenting his driver's license and registration, there was no longer a legal basis upon which the arresting officer could further detain him. *Goode v. State*, 41 Md. App. 623 (1979).

It is respectfully submitted that the observations of the arresting officer, if not sufficient to compel him to issue a citation

to the petitioner, also failed to furnish the necessary reasonable suspicion required for an investigatory stop. Because, as has been previously noted, the arresting officer did not even have his citation book in his possession at the time he began the conversation with the petitioner, his actions in requiring the petitioner to submit to a "routine field test" were little more than unlawful and unconstitutional evidence gathering.

It is respectfully submitted that, as a matter of law, the petitioner was not even required to exit his vehicle if no citation was being issued for a moving violation. *See Pennsylvania v. Mimms*, 434 U.S. 106 (1979).

For these reasons, it is respectfully submitted that the trial court committed error in considering any testimony presented by Agent Sabo concerning the petitioner's actions subsequent to the stopping of his vehicle. However, to the extent that the trial court did so, these actions were reversible error presenting issues of a constitutional dimension for consideration by this Court. These actions of the trial court were further compounded by the error which was committed in refusing to merge the charge of negligent driving into the conviction for driving while impaired. *See Benton v. Maryland*, 395 U.S. 784 (1969).

Accordingly, these issues which are of importance for the proper adjudication of cases of a similar nature are now a proper subject for review by this Court. The petitioner respectfully urges that the decisions of the lower courts in this case be considered by this Honorable Court and that an opportunity be granted to present to this Court a full statement of the law relating to the subject.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this Honorable Court issue a writ of certiorari to the Court of Appeals of Maryland to review the decision entered in the within case.

Respectfully submitted,

s/ William J. Wiseman

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APPENDIX

ORDER OF THE COURT OF APPEALS OF MARYLAND DENYING PETITION

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 385

September Term, 1982

(No. 1494, September Term, 1981 Court of Special Appeals)

ROBIN J. PECORA

v.

STATE OF MARYLAND

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

s/ Robert C. Murphy
Chief Judge

Date: November 5th, 1982.

OPINION OF THE COURT OF SPECIAL APPEALS OF MARYLAND

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

NO. 1494

September Term, 1981

ROBIN J. PECORA

VS.

STATE OF MARYLAND

MacDaniel
Bishop
Bowen, Jr., Perry G.
(Specially Assigned)
JJ.

PER CURIAM

FILED: August 10, 1982

The Appellant was convicted in a Non-Jury trial by the Criminal Court of Baltimore City (Bell, J., presiding) of driving while impaired, and negligent driving. From the sentences imposed he has taken this appeal.[1]

Appellant raises the following questions:

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1. Appellant was also convicted of and sentenced for fleeing or eluding the police but did not appeal that conviction and sentence.

Opinion

1. Was the evidence sufficient to sustain Appellant's conviction for driving while impaired?

2. Should the conviction for negligent driving be merged into the conviction for driving while impaired?

3. Did the Trial Court commit error with respect to the conduct of the Prosecutor at the time of sentencing?

Maryland Rule 1086 requires this Court in cases tried by the lower Court without a jury to "—review the case upon both the law and the evidence but the judgment of the lower court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the creditability of the witnesses."

There was evidence in this case tending to show that the Defendant was trying to get in a barroom after it had closed. He made such a disturbance in claiming that a shirt he wanted was inside that the people in the bar called the police. At that point no shirt was found, he smelled of alcohol and impressed the officer as being affected by alcohol. Suspecting that he may have been the driver of a car leaving the area shortly thereafter the policeman *followed* it and after observing some questionable movements, stopped the car. When asked for his license, Appellant, an attorney, gave the officer first a business card, then his driving record and finally his license. After he was ordered out of the car he was staggering slightly. When requested to walk on the sidewalk he took about 2 steps got back into his car and drove it at high speed directly into the nearest of a line of three cars parked along the curb about two car lengths in front of his car. When his car stopped and rebounded from the first striking he drove it into the parked car a second time.

Opinion

In *State v. Rush*, 289 Md. 230 (1981) the Court of Appeals said:

> "Of course, due process requirements mandate that a criminal conviction not be obtained if the evidence does not reasonably support a finding of guilt beyond a reasonable doubt. *Tichnell v. State*, 287 Md. 697, 415 A. 2d 830 (1980). However, as the Supreme Court made clear in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), the reviewing court does not ask itself whether it believes that the evidence established guilt beyond a reasonable doubt; rather, the applicable standard is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

If Judge Bell believed, as he obviously did, the testimony of the police officers, there was overwhelming evidence to support his finding of guilty on the charge of driving while impaired.

The argument by Appellant that the officer did not have authority to stop Appellant, detain him and request him to walk on the sidewalk is frivolous. The authorities cited by Appellant are not relevant to any issue of sufficiency of the evidence on this charge. The answer to the first question raised by the Appellant is, Yes!

The test for merger in Maryland is stated by the Court of Appeals in *Newton v. State*, 280 Md. 260 at pg. 268 (1977).

Opinion

> "Thus, under both federal double jeopardy principles and Maryland merger law, the test for determining the identity of offenses is the required evidence test. If each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited."

Regardless of the actual evidence used to establish the facts the test is whether a separate fact or element of the crime must be proven for each crime being considered. Impairment by alcohol or drugs is a fact or element evidence of which is required to prove the charge of driving or attempting to drive while impaired. It is not an element or fact evidence of which is required to prove negligent driving. Actual operation of a vehicle in a reckless and wanton manner is a fact or element of evidence proof of which is required to prove the crime of reckless driving. No such fact or element is required to be proven in a case of driving or attempting to drive while impaired. Thus each offense requires proof of a fact or element not required to prove the other and they do not merge. The answer to the second question raised by the Appellant is No!

The Appellant contends that the actions of the prosecutor at sentencing were improper and require a new trial. The authorities cited by Appellant both relate to conduct of prosecutors in jury trials which took place before the verdict. A review of the record at sentencing shows that the Appellants contentions are groundless. The prosecutor had a right and a duty to bring to the Court's attention any matter which could be considered in determining the sentence. The Court at sentencing is not limited to the evidence

admitted during the trial but may consider anything having a bearing on the sentence so long as the defense is informed of it and afforded an opportunity to rebut or explain it.

Other than the maximum limits prescribed by law and the constitutional prohibitions against cruel and unusual punishments the only restraint on sentencing courts is "that the sentencing judge not be motivated by ill-will, prejudice or other improper considerations." *Kaylor v. State*, 285 Md. 66 (1979). Appellant here makes no such claim and the record at sentencing shows affirmatively that none could be made. The answer to the third question raised by the Appellant, is No!

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY APPELLANT

RELEVANT STATUTES

Annotated Code of Maryland, §13-409:

"§13-409. Registration card to be carried and exhibited on demand of police officer.

(a) *In general.* — At all times, each registration card shall be carried:

(1) In the vehicle to which it refers; or

(2) By the individual driving or in control of the vehicle, who shall display it, on demand, to any police officer who identifies himself as such.

(b) *Exception.* — This section does not apply if the card is being used to apply for the transfer of registration of the vehicle. (An. Code 1957, art. 66½, §3-409; 1977, ch. 14, §2.)"

Transportation, §16-112:

"§16-112. License to be carried and exhibited on demand; giving of false name prohibited.

(a) *Possession and display of license; writing sample.* —(1) In this subsection, 'display' means the manual surrender of the licensee's license into the hands of the demanding officer for inspection.

(2) Each individual driving a motor vehicle on any highway in this State shall:

(i) Have his license with him;

(ii) Display the license to any uniformed police officer who demands it; and

(iii) If requested by the officer, sign his usual signature in the presence of the officer so that the officer may determine whether he is the licensee.

(b) *Giving false name.* —A person may not give the name of another person or give a false or fictitious name to any uniformed police officer who is attempting to determine the identity of a driver of a motor vehicle. (An. Code 1957, art. 66½, §6-112; 1977, ch. 14, §2.)"

Annotated Code of Maryland, §21-901.1:

"§21-901.1. Reckless and negligent driving.

(a) *Reckless driving.* — A person is guilty of reckless driving if he drives a motor vehicle:

(1) In wanton or willful disregard for the safety of persons or property; or

(2) In a manner that indicates a wanton or willful disregard for the safety of persons or property.

(b) *Negligent driving.* — A person is guilty of negligent driving if he drives a motor vehicle in a careless or imprudent manner that endangers any property or the life or person of any individual.

Relevant Statutes

(An. Code 1957, art. 66½, §11-901; 1977, ch. 14, §2.)

Annotated Code of Maryland, §21-902:

"21-902. Driving while intoxicated, ability impaired, or under the influence.

(a) *Driving while intoxicated.* — A person may not drive or attempt to drive any vehicle while intoxicated.

(b) *Driving while ability impaired by alcohol.* — A person may not drive or attempt to drive any vehicle while his driving ability is impaired by the consumption of alcohol.

(c) *Driving while under influence of drugs or drugs and alcohol.* — (1) A person may not drive or attempt to drive any vehicle while he is so far under the influence of any drug, any combination of drugs, or any combination of drugs and alcohol that he cannot drive a vehicle safely.

(2) It is not a defense to any charge of violating this subsection that the person charged is or was entitled under the laws of this State to use the drug, combination of drugs, or combination of drugs and alcohol, unless the person was unaware that the drug or combination would make him incapable of safely driving a vehicle.

(d) *Driving while under influence of controlled dangerous substance.* — A person may not drive or attempt to drive any vehicle while he is under the influence of any controlled dangerous substance, as that term is defined in Article 27, §279 of the Code, if the person is not entitled to use the controlled dangerous substance under the laws of this State. (An. Code 1957, art. 66½, §11-902; 1977, ch. 14, §2.)

Annotated Code of Maryland, §21-904:

"21-904. Fleeing or eluding police.

(a) *Scope of section.* — This section applies when a police officer gives a signal to stop, whether by hand, voice, emergency light, or siren, if:

(1) The police officer is in uniform, prominently displaying his badge or other insignia of office; and

(2) The police officer, when in a vehicle, is in a vehicle appropriately marked as an official police vehicle.

(b) *Driver to obey signal.* — If given a visual or audible signal by a police officer to stop his vehicle, the driver of a vehicle may not attempt to elude the police officer, whether:

(1) By willfully failing to stop his vehicle;

(2) By fleeing on foot; or

(3) Otherwise, by any other means. (An. Code 1957, art. 66½, §11-904; 1977, ch. 14, §2.)"